Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

Polar Equipment Inc., d/b/a Cook Inlet Processing, Inc., and Nautilus Marine Enterprises, Inc.,
Petitioners

v.

Grant Baker, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In violation of their fiduciary duties, and thus this Court's decision in *Exxon Shipping Co. v. Baker*, 128 S.Ct 2605 (2008), Class Counsel/Plaintiffs' Committee have repeatedly discriminated against two businesses, fish processors, vested stand alone class members Cook Inlet Processing, Inc. ("CIP") and Nautilus Marine Enterprises, Inc. ("NME"), intending to "squeeze out" CIP and NME, to keep greater shares of the Exxon Qualified Settlement Fund ("EQSF") punitive damages proceeds "pie" of $1, 105, 689,467.82, with the lion's share for their own contingency fee fishermen clients. They initially did so by using the 1989/1990 partial releases, "cede back" agreements, between Exxon and CIP and NME to effectively eject them from the plans of allocation and distribution as to the "matrix" for proceeds "collected by" Class Counsel/Plaintiffs' Committee. However, Class Counsel/Plaintiffs' Committee disingenuously ignored and forgave the same releases, "cede backs", as to their own fishermen clients, while maintaining their own fishermen clients' take under the "matrix".

In 2003 a settlement was reached with Class Counsel/Plaintiffs' Committee as to such discrimination, by which CIP and NME officially withdrew from the Joint Prosecution and Sharing Agreement to become stand alone class members entitled to fully receive and retain all proceeds of their *Robins Dry Dock* compensatory damage claims with Exxon, with the expressly preserved right to "eat what they kill" in reaching any deal with Exxon as to their compensatory damages claims, including re-obtaining previously conveyed "cede back" rights

as to punitive damages proceeds as part of settlement of same. In 2006, "on the eve of jury trial", CIP and NME settled with Exxon as to those claims, and the settlement proceeds included rescinding the 1989/1990 releases, reassigning and restoring the "cede back" rights to CIP and NME, to wit: 5% of punitive damages proceeds (i.e., $45 million). Said $45 million as to CIP's and NME's claims is currently reserved for same in the EQSF.

Significantly, Class Counsel/Plaintiffs' Committee continue to discriminate against CIP and NME, "squeeze them out" and refuse to honor their vested rights to those funds, thereby shifting that $45 million to other class members, to a large part their own contingent fee clients. This is not only a violation of CIP's and NME's rights, but a clear conflict of interest as to the fiduciary duties owed by Class Counsel/Plaintiffs' Committee to stand alone class members CIP and NME.

Thus, the questions presented for review are:

1. May a federal court and class action counsel, consistent with Due Process, Right to Jury Trial and Equal Protection, and their fiduciary duties under Rule 23 of the FRCP and IRC §468B, and the law of settlements, constitutional rights of plaintiffs to receive the "fruits" of their causes of action, and the law of "commercial paper", discriminate against and "squeeze out" certain vested fish processor businessmen class members by allowing certain fisherman members (to wit: the contingent fees clients of Class Counsel) of a mandatory punitive damage class in a

maritime case to receive more than their share of a 1:1 pro rata ratio of their compensatory damages to punitive damages awarded to the entire class, and refuse to disburse any punitive damages to other vested businessmen members of the class, despite said stand-alone businessmen members 5% share of aggregate collected compensatory damages (given their devastating financial losses from a mass tort at sea) and such stand-alone members' status as holders in due course, for valuable consideration, of "commercial paper" i.e., "cede back" rights as to that 5 %, who are entitled, under the law of the case, to collection and disbursement "off the top" of said funds to be "collected by" Petitioners in a similar fashion to other "off the top" beneficiaries?

2. Did the Ninth Circuit and District Court err in holding stand-alone plaintiffs/class members CIP and NME waived their 5% pro rata share of punitive damage proceeds by withdrawing from the Joint Prosecution and Sharing Agreement [in fact, thereby, only foregoing solely the rights then existing and not after-acquired, to receive portions of the punitive damage proceeds "collected by" Class Counsel/Plaintiffs' Committee (i.e., 81 %) reserved for disbursement among signatories of the Joint Prosecution and Sharing Agreement] in lieu of, and vested with, the option to obtain the right to receive settlement funds "off the top" (and segregated from that other portion "collected by" Class

Counsel/Plaintiffs' Committee) by misapprehending the distinction between punitive damages "awarded to" a class as a whole, punitive damages proceeds "collected by" certain counsel on behalf of signatories to a Joint Prosecution and Sharing Agreement (81%), and punitive damages set aside and "collected by" stand-alone parties, like the Native Corporations (3%) and Seattle Seven/Exxon (11%) and CIP and NME (5%), as holders in due course for value of valid "cede back" rights to "off the top" distributions from the EQSF?

3. Did the Ninth Circuit and District Court fail to honor the Fifth, Seventh and Fourteenth Amendments of the United States Constitution, and Alaska Constitutional rights to Due Process, Jury Trial recovery, and Equal Protection rights of CIP and NME to the benefits of the "fruits" of a plaintiffs' jury trial cause of action, settlement proceeds, and "commercial paper", to wit: "cede back" rights "blessed" by the Ninth Circuit and purchased directly from the defendant Exxon for value as partial payment and proceeds of their 2006 settlement of CIP's and NME's *Robins Dry Dock* compensatory damage claims via the rescinding and reassignment as to the 1989/1990 releases "cede back" agreements, which full 2006 settlement proceeds were promised to, and are due, to CIP and NME under the 2003 settlement CIP and NME reached with Class Counsel/Plaintiffs' Committee?

4. Did the Ninth Circuit misinterpret and misapply CIP's and NME's 2003 settlement agreement with Class Counsel/Plaintiffs' Committee, by ignoring the distinction between punitive damage proceeds "awarded to" a class as a whole, proceeds "collected by" and distributed to certain members of the class as signatories to a Joint Prosecution and Sharing Agreement, and punitive damages proceeds set aside for, "collected by," and distributed to stand-alone parties, such as CIP, NME, and Exxon, as holders in due course of valid "cede back" rights, and further err by ignoring the legal distinction between CIP's and NME's 2003 releases solely of certain then existing rights addressed by a settlement agreement as opposed to "after-acquired" rights that were preserved by the same settlement agreement?

5. Did the District Court err by ignoring said distinction between "awarded to" and "collected by" and the legal distinction in the 2003 settlement agreement between a release solely of certain then existing rights as opposed to "after-acquired" rights that were preserved by the same settlement agreement for CIP and NME to seek, re-obtain and retain the right to certain "cede back" shares, or "slice" of the "punitive damage proceeds pie" to be "collected" and distributed "off the top"?

In *Baker*, 128 S.Ct 2605, this Court held a 1:1 ratio of compensatory to punitive damages is the

upper limit of punitive damages in federal maritime cases and directed the Ninth Circuit to remit the punitive damages award based on the aggregate compensatory damages sustained and collected by all plaintiffs in the Mandatory Punitive Damages Class. Petitioners' compensatory damages collected represent 5% of those aggregate compensatory damages collected. CIP and NME are vested stand alone class members, holders in due course for value of "cede back" rights as proceeds of the 2003 settlement with the Plaintiffs' Committee/Class Counsel and the 2006 settlement with Exxon, and thus owners of, and entitled to, a collective 5% pro rata share of punitive damages proceeds currently reserved for them in the EQSF relative to CIP's and NME's actual compensatory damages, which are over $62 million (excluding prejudgment interest and attorney's fees) and collected compensatory damages of 5% of the aggregate collected compensatory damages of approximately $500 million.

CIP's and NME's pro-rata 5% share, valued at over $45 million (5% of approximately $500 million of punitive damages and 5% of $500 million of prejudgment interest and attorney's fees), is poised for distribution by the EQSF and Class Counsel/Plaintiffs' Committee to other class members, who will receive more than 1:1 pursuant to the erroneous Ninth Circuit and District Court decisions below. CIP and NME ask this Court to grant this Petition to correct an egregious departure from the accepted and usual course of judicial proceedings.

This nullification and divesture will be left uncorrected should this Court deny this Petition.

The District Court and Ninth Circuit erred by misconstruing the distinction between that portion of the punitive damages proceeds "pie" to be "collected by" and distributed via the Class Counsel/Plaintiffs' Committee as opposed to that other portion of the "pie" set aside for "off the top" collection and distribution. Both lower courts erred by misapplying CIP's and NME's limited 2003 releases, which were solely of then existing rights to proceeds "collected by" Class Counsel/Plaintiffs' Committee (e.g., not after-acquired rights or "cede back" proceeds) as a signatory to a Joint Prosecution and Sharing Agreement, wholly ignoring CIP's and NME's express preservation of their right to negotiate directly with Exxon to purchase (i.e., obtain after-acquired rights) and collect, "in the shoes" of Exxon, the "ceded back" rights re previously assigned punitive damages "off the top" by means of a cede back settlement mechanism "blessed" by the Ninth Circuit as the only realistic way that Exxon had of settling with individual plaintiffs in light of the impending mandatory class. (*In re the Exxon Valdez,* 229 F.3d 790 (9th Cir. 2000) *(Seattle Seven)*, and in *In re the Exxon Valdez*, 239 F.3d 985 (9th Cir. 2001) *(Four Processors)*).

This concept of a "slice" of a "punitive damage proceeds pie" to be either "collected by" and distributed to certain class members in accord with their pro rata share of compensatory damages or to be "collected by" the beneficiaries/assignees/promises of certain "cede back" rights was recognized by the Ninth Circuit, in *Seattle Seven*, 229 F.3d at 793, wherein the Court stated, in explaining why such "cede backs" were in furtherance of public policy and necessary for a settling defendant such as Exxon to

use as opposed to a mere release: "*...a plaintiff's release of its slice of the future lump-sum punitive damages award merely reduced the number of claimants sharing the punitive damages pie, not the size of the pie itself...*" (emphasis added).

Class Counsel/Plaintiffs' Committee and the lower courts have denied CIP and NME their 5% share (i.e., "slice") of the "pie" to which they are entitled as vested members of the mandatory class, promisees of the 2003/2006 settlement proceeds, due process owners of the "fruits" of their causes of action, holders in due course for value of the "commercial paper", to wit: the reassigned "cede back" rights.

In fact, the EQSF, since it was established in 1995, has consistently recognized two distinct methods of "collecting" and distribution of proceeds – one for signatories to Plaintiffs' Committee's Joint Prosecution and Sharing Agreement with related plans of allocation and distribution through a "matrix" (which is not directly at issue here) and another set aside for "non-signatories and stand-alone class members' to be collected and distributed "off the top" (and thus not "collected by" Plaintiffs' Committee/Class Counsel) as evidenced by approved punitive damages proceeds disbursements to certain Native Corporations (3% "off the top"), as well as the Seattle Seven/Exxon (11% "off the top") via "cede back" and thus due CIP and NME (5% "off the top") via the assignment and "cede back" mechanism approved of by the Ninth Circuit (*Seattle Seven*, 229 F.3d at 796).

Having been fully released from, and free of, the Joint Prosecution and Sharing Agreement in the 2003 settlement with Class Counsel/Plaintiffs'

Committee (even to the extent of no obligation, distinct from all other class members, to pay 3% to Class Counsel/Plaintiffs' Committee for attorney's fees) as stand-alone plaintiffs who possess, as holders in due course for value, those "cede back" rights, which were purchased for good and valuable consideration as proceeds of their compensatory damages claims, to wit: proceeds of the 2006 settlement with Exxon, CIP and NME, as a matter of basic Due Process, Equal Protection and Jury Trial recovery, the law of settlements, and as vested members of the mandatory class, and the law of "commercial paper", are entitled to fully receive and retain that 5%, to wit: the $45 million that is being reserved and held for them by the EQSF.

PARTIES TO THE PROCEEDING

Petitioners are POLAR EQUIPMENT INC., d/b/a/ COOK INLET PROCESSING, INC., and NAUTILUS MARINE ENTERPRISES, INC., Plaintiffs-Appellants below.

Respondents are GRANT BAKER, ALASKA SPORT FISHING ASSOCIATION; LOUIS E. ALBER, AHMET ARTUNER; JEFFREY BAILEY; WILLIAM BENNETT; MICHAEL WAYNE BULLOCK, ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.; DEW DROP, INC.; LARRY L. DOOLEY, MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD P. KOMPKOFF, Sr.; JOSEPH KOPECKY; DANIEL LOWELL; ANDREAN E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, Sr.; MICHAEL McLENAGHAN; ELENORE E. McMULLEN; LESLIE R. MEREDITH; NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE; STEVEN T. OLSEN; AUGUST M. PEDERSEN, Jr.; MARY LOU REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD, as class representatives of the Mandatory Punitive Damages Class certified by the District Court below, (App. 55-63) and all persons similarly situated, who were Plaintiffs-Appellees below, and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO., Defendants-Appellees below.

RULE 29.6 DISCLOSURE

Polar Equipment, Inc. is a corporation wholly owned by Michael Shupe, and does business as Cook Inlet Processing, Inc.

Nautilus Marine, Inc. (aka Nautilus Marine Enterprises, Inc.) is a privately held corporation owned by M. Thomas Waterer.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Polar Equipment Inc., d/b/a Cook Inlet Processing, Inc., Nautilus Marine Enterprises, Inc., petition for a Writ of Certiorari to review Judgment of United States Court of Appeals for Ninth Circuit.

OPINIONS BELOW

Ninth Circuit Memorandum is unreported, and is reprinted at App. 1-4. District Court Decision, likewise unreported, is reprinted at App. 5-54.

JURISDICTION

Ninth Circuit issued Opinion on July 24, 2009 (App. 1-4), with denial of Petition for Panel Rehearing and Rehearing En Banc on September 23, 2009 (App. 73-75). Jurisdiction is under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the **Fifth**, **Seventh**, and **Fourteenth Amendments of the United States Constitution**, Rule 23 of the Federal Rules of Civil Procedure and Section 468B of the Internal Revenue Code.

The **Fifth Amendment** provides: "No person shall be deprived of life, liberty, or property, without due process of law."

The **Seventh Amendment** provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The **Fourteenth Amendment** provides:

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 23 of the Federal Rules of Civil Procedure is at App. 106-115.

Internal Revenue Code, § 468B, is at App. 100-105 ("... the fund shall be treated as the owner of the property in the fund (and any earnings thereon").

Similar vested rights exist under federal maritime law, as well as similar constitutional and

statutory rights under Alaska Law, and further rights under Alaska law, including **AS 46.03.822** (App. 87-98) and **AS 46.03.824** (App. 99) for victims of toxic torts to recover compensatory and punitive damages.

STATEMENT OF THE CASE

A. Summary of Key Facts

As of December 9, 2009, EQSF has reserved $45 million, CIP's and NME's 5% pro rata share of punitive damage proceeds, based on their vested interest in same by virtue of 2006 settlement proceeds purchased from Exxon, in partial settlement of CIP's and NME's compensatory damages, i.e., "cede back"/reassignment rights, held by Exxon from 1989/1990 to 2006, for 5% of the punitive damage award "off the top."

CIP's and NME's 5% share of compensatory damages collected, are 5% of aggregate compensatory damages collected. CIP's and NME's share of total EQSF "pie" ($1,105,689,467.82) is $45 million, which consists of punitive damages and post judgment interest and attorney's fees, as directly proportional 1:1, pursuant to this Court's ruling in *Exxon Shipping Co. v. Baker,* 128 S.Ct 2605 (2008).

CIP and NME incurred great costs, including investigation, expert reports, discovery and deposition expense, attorneys' fees, to directly prosecute their compensatory damages "*Robins Dry Dock*" claims, culminating in 2006 settlement agreement on eve of jury trial with Exxon, by which they agreed to forego jury trial rights, in exchange for good and valuable, bargained-for consideration, including: (1) $8.5 million; (2) payment of additional

funds in light of courts' resolution of issues as to prejudgment interest and attorneys' fees; and (3) rescission or releases and reassignment as to their rights to pursue and collect punitive damages ("Cede Back Rights").

Certain compensatory damages proceeds CIP and NME obtained, were included in $507.5 million figure, used to calculate value of punitive damages owed by Exxon, in light of Court's *Baker* 1:1 ratio decision, effect of which courts below have now nullified based on misinterpretation of a 2003 agreement between CIP, NME and Class Counsel/Plaintiffs' Committee.

Nullification of Cede Back Rights to their 5% share of punitive damage proceeds CIP and NME purchased from Exxon in 2006, which will result if Court denies Petition, sanctions EQSF and Class Counsel/Plaintiffs' Committee's "squeeze out" of vested class members CIP and NME, and distribute their punitive damages, beyond 1:1 ratio contemplated by this Court, to those class members who remain, including, unlike CIP and NME, clients of the Plaintiffs' Committee, and signatories to the Joint Prosecution and Sharing Agreement (thereby increasing Plaintiffs' Committee's contingent share of attorney's fees) eliminating any distribution of punitive damage proceeds to CIP or NME.

B. Factual and Procedural Background

1. *CIP's and NME's Financial Devastation from EVOS.*

On 3/24/1989, Exxon Valdez ran aground in Prince William Sound, Alaska, causing massive oil spill ("EVOS") which financially devastated local businesses and fish processors, such as CIP and "NME." NME was at "ground zero," in Valdez with

not only its source of fish to be processed destroyed, but facilities, dock and employees "shanghaied" by Exxon for clean-up operations. In year prior to EVOS, CIP had made millions of capital expenditures into facilities in Prince William Sound and related Alaskan fisheries, on brink of reaping rewards of its investment when EVOS occurred, and thereby suffered extraordinary loss.

CIP's and NME's actual combined compensatory damages to date exceed $62 million (not including prejudgment interest and attorneys fees), and may well be in excess of $100 million as this litigation continues.

CIP's and NME's actual compensatory damages recovered are approximately 5% of aggregate compensatory damages received, as recognized by District Court, Ninth Circuit, and this Court in *Baker*.

Both CIP and NME filed direct actions against Exxon to recover compensatory losses as a result of EVOS, and for punitive damages claims in Alaska State Court. (App. 87-99 and 127-146), and were the subject of a mandatory federal class action removal. (App. 55-63). The District Court asserted jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1333, 1441, and 1442.

2. *1989/1990 Agreement Using "Cede Back" Mechanism Similar to Seattle Seven and "Blessed" by Ninth Circuit.*

Like thousands of other victims of EVOS on brink of financial ruin, and held "economic prisoners" by Exxon, CIP and NME were compelled to enter into partial assignments and settlements with Exxon in 1989 (as to NME) and 1990 (as to CIP) (collectively, "1989/1990 Agreements"). (App. 116-

126). Agreements did not address all of CIP's and NME's compensatory damages, just those suffered in 1989 and part of 1990, so CIP and NME could receive some money to keep their doors open pending conclusion of litigation.

Specifically, in 1989/1990 Agreements, CIP and NME released certain claims and ceded/assigned their claim to punitive damages arising out of EVOS to Exxon (i.e. a classic "cede back" agreement). In exchange, Exxon paid CIP $2,850,000, including releases as to 1989 compensatory damages and through 5/22/1990, while NME received $2,245,279, including releases as to 1989 losses. (App. 116-126).

Similar agreements were also signed by fishermen class members, but Class Counsel/ Plaintiffs' Committee agreed with Exxon to disregard those as to their own contingent fee clients, while concurrently using same types of agreements, initially to effectively "squeeze out," "ban," and "eject" CIP and NME from any share of punitive damages under initial Joint Prosecution Sharing Agreement, plans of allocation and distribution, and matrix.

"Cede back" mechanism in 1989/1990 Agreements as assignments of punitive damages, as also used by "Seattle Seven" processors, initially held invalid by District Court, was later "blessed" by the Ninth Circuit. *In Re the Exxon Valdez,* 229 F.3d 790 (9th Cir. 2000) (hereinafter "*Seattle Seven*") and *In Re the Exxon Valdez,* 239 F.3d 985 (9th Cir. 2001) (hereinafter "*(Four Processors*").[1] Exxon is now

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[1] This appeal was prosecuted by Exxon itself as the assignee of four excluded processors' i.e., the "Four Processors."

using same cede back mechanism, with Plaintiffs' Committee's approval, to collect 11% "off the top" of the EQSF. (App. 235-237). However, CIP and NME are denied equal treatment.

3. *State Court Complaints (Post 1989/1990 Agreement), Forcible Removal to Federal Court, Certification of Mandatory Punitive Damages Class.*

CIP's and NME's businesses continued to suffer after 5/22/1990, and CIP's and NME's compensatory damages from EVOS, excluding prejudgment interest, attorney's fees, total $39,084,000 (CIP) and $23,889,000 (NME).

On 3/26/1991, CIP filed direct action complaint in Alaska state court, in asserting right to recover damages incurred after May 1990. (App. 127-130). On 9/6/1994, NME filed Alaska state court direct action complaint against Exxon for post-1989 losses. (App. 131-146). Both sought punitive damages under Alaska law (App. 87-99) and federal maritime law.

CIP's and NME's post-1989 state court causes of action were subsequently forcibly removed to Federal District Court (the "District Court"). (App. 55-63). CIP and NME were forced into District Court, although their causes of action for compensatory damages and punitive damages existed under both federal maritime law and Alaska state law (see AS §§ 46.03.822 and 46.03.824 and *Maddox v. Hardy*, 187 P.3d 486 (Alaska 2008)) given their status as victims of mass toxic tort in Prince William Sound, Alaska and related Alaska fisheries.

On 4/15/1994, District Court certified Mandatory Punitive Damage Class as to all persons or entities that "possess" or "have asserted" claim(s)

for punitive damages against Exxon arising from the EVOS. (App. 55-63). Since that time, CIP and NME have remained full and vested members of the Mandatory Punitive Damages Class, still so situated.

4. *Erroneous Dismissal of Processors' "Robins Dry Dock" Compensatory Damage Claims.*

On 1/26/1994, District Court erroneously dismissed claims of seafood processors (including CIP and NME), on motion for summary judgment, holding that the fish processors' claims were barred by *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), which may preclude recovery of certain economic losses absent physical damage to proprietary interest. They appealed and were successful in reinstating their claims under Alaska law. *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

5. *Plaintiffs' Committee's Initial Discrimination Against and "Squeeze Out" of CIP and NME in Joint Prosecution and Sharing Agreement.*

The jury awarded $287 million in compensatory damages on fishermen's compensatory damages and $5 billion in punitive damages. (App. 147-148).

Prior to verdicts, during time they were signatories to Joint Prosecution and Sharing Agreement, CIP and NME worked closely with Plaintiffs' Committee, with NME providing valuable services and advice and evidence as to compensatory and punitive damages. Following jury verdicts, Class Counsel/Plaintiffs' Committee approved compensatory damage claims for their fishermen

clients in aggregate of $1.5 billion (5.5 times greater than the amount awarded by jury), for purposes of "matrix".

$1.5 billion approved by Class Counsel/Plaintiffs' Committee as to their own fishermen contingent fee clients' claims presumably included $585 million rejected by jury. Class Counsel/Plaintiffs' Committee also approved additional $628 million in claims (including CIP's and NME's damages which Class Counsel/Plaintiffs' Committee undervalued at $20 million with significant reduction by Class Counsel for "litigation risk" taken on their behalf), approving class' total compensatory damage claims at $2.2 billion for purposes of "matrix".

No doubt, Class Counsel/Plaintiffs' Committee expected short fall to come from $5 billion in punitive damages awarded by jury.

After punitive damages verdict, Exxon and Seattle Seven revealed their secret "cede back" deal, which had not been revealed to jury, Class Counsel/Plaintiffs' Committee or District Court, whereby Exxon held percentage of the Seattle Seven's rights (including approximately 20% of punitive damage award, subsequently reduced to 11% by agreement) to punitive damages pursuant to their "cede back" agreement. Exxon moved to reduce judgment under Seattle Seven cede back agreement, and also stated they had similar rights as to CIP and NME.

This revelation, quite frankly, not only drew concern and extreme "ire" of District Court and Plaintiffs' Committee, but created somewhat of a "panic."

Class Counsel/Plaintiffs' Committee and District Court realized "secret deal" with Seattle Seven would reduce the $5 billion initial punitive damage recovery by approximately $1 billion, and sought to resist and avoid same. In doing so, Class Counsel/Plaintiffs' Committee "turned on" CIP and NME, out of concern if they did not seek to "squeeze them out," and eject them from any punitive damages recovery, it might prejudice position they were taking before Ninth Circuit that Seattle Seven "cede backs" were invalid and should not be honored (a position ultimately held erroneous by the Ninth Circuit).

District Court initially refused to honor cede back agreements, and Plaintiffs' Committee, fearful Seattle Seven cede back would reduce recovery "collected by" them for distribution to signatories to Joint Prosecution and Sharing Agreement, "threw the baby out with the bath water" and "turned on" CIP and NME, denying CIP and NME any punitive damages proceeds under Joint Prosecution and Sharing Agreement and plans of allocation and distribution and matrix, stating CIP and NME had released and/or assigned same to Exxon in 1989/1990 Agreements.

Class Counsel/Plaintiffs' Committee informed CIP and NME, despite their substantial compensatory damages (which were included in Plaintiffs' Committee's ultimate punitive damages settlement with Exxon under *Baker*, and now equate to 5% of punitive damage proceeds sought on this Petition), CIP and NME would be excluded under Joint Prosecution and Sharing Agreement from any share of punitive damage award because CIP and NME had released and/or "ceded back" their

punitive damages claims with Exxon in 1989/1990 Agreements. CIP and NME resisted Class Counsel/Plaintiffs' Committee's attempt to exclude them, but were unsuccessful before the District Court and Ninth Circuit at that time. *In Re the Exxon Valdez*, 2000 WL 1844460 (9th Cir. Dec. 14, 2000) cert. denied 533 U.S. 903 (2001).

6. *EQSF Established Over Exxon's Objection.*

On 12/1/1994, Class Counsel/Plaintiffs' Committee moved District Court, pursuant to Internal Revenue Code §468B, for an order to establish Exxon Qualified Settlement fund. (U.S.D.C. Docket 6189).

Class Counsel/Plaintiffs' Committee asked District Court to appoint Lynn Lincoln Sarko as Administrator of EQSF, retain jurisdiction over any claims filed against the EQSF or its assets, and to direct Sarko to "[c]omply with, and perform all duties required under, Code §468B and Treasury Regulations § 1.468B-1 thorugh-5 ...". Id.

Exxon opposed on grounds it would interfere, as it has here, with Exxon's attempt to settlement with individual plaintiffs.[2]

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[2] Exxon argued that Plaintiffs' Committee's motion to establish the EQSF for the entire "pie" served as a:

> [N]aked power-grab designed to enhance the authority" of certain Lead Plaintiffs by erecting the EQSF as a 'coercive mechanism that with require any settlement reached in the future with any plaintiff to be funneled through a fund controlled by certain of plaintiffs' class action counsel. . . Past experience shows that the involvement of precisely these lawyers tends to reduce, not enhance, the possibility of partial

On 1/25/1995, District Court established EQSF, directing Exxon to deposit $20 million for disbursement to Alaska Native Class. (App. 64-72).

7. *District Court Recognizes Two Methods of "Collection" and Disbursement of Punitive Damages Proceeds – to Signatories to Plaintiffs' Committee's Joint Prosecution and Sharing Agreement vs. "Off the Top" as to Non-Signatories and Cede Back Right Holders.*

Plans of allocation and distribution for EQSF, as amended, created two categories of claimants: those who are parties (signatories) to Plaintiffs' Committee's Joint Prosecution and Sharing Agreement, and those who are not.[3] Signatories,

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settlements " (U.S.D.C. Docket 6214 [redacted version].

Exxon's prediction as to disruptive effect of EQSF on future settlement was accurate:

> If any settlement is arrived at with any plaintiff, whether in federal or in state court, the proceeds of such a settlement may not be paid to the plaintiff, or as the plaintiff directs, but *must be paid into the Exxon QSF which Mr. Sarko will control as Administrator, and then distributed when and if he and the other plaintiffs' counsel choose to do so*, subject to the Court's supervision .. Common sense indicates, however, that this litigation has reached precisely the state where restrictions on individual parties' ability to settle are undesirable and short-sighted ... (U.S.D.C. Docket 6214 [redacted version]) (emphasis added)

[3] Joint Prosecution and Sharing Agreement provided, as amended in 1995, signatory counsel agreed:

receive their share "collected by" Class Counsel/Plaintiffs' Committee for signatories of the Joint Prosecution and Sharing Agreement, to be distributed under plans of allocation and distribution through "matrix" scheme as to relevant class categories, i.e., fishermen, landowners, processors, etc. They have approximately 81% of "pie."

Latter, non-signatories and "cede back" holders, receive "off the top" pro rata share of remaining funds (i.e., funds not "collected by" Class Counsel/Plaintiffs' Committee) and thus not subject to reduced "matrix shares" (which account for litigation risk undertaken by lead counsel on signatories' behalf) applicable to signatories to Joint Prosecution and Sharing Agreement. They have approximately 19% of "pie."

Judge Holland explained:

> The plan originally reserved 3% '<u>off the top</u>' of all awards for six Native

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> All recoveries from [the Exxon] defendants by any plaintiff or group of plaintiffs, [signatories to same and not stand alone plaintiffs] whether by settlement or trial, will be shared among all plaintiffs (whether their claims survive or are dismissed and are subject to appeal at the time of payment) in accordance with the allocation matrix attached ... (U.S.D.C. Docket 8528)

Relevant allocation matrix provided that the seafood processors would receive 2 1% of any recoveries. CIP's and NME's counsel initially signed onto Joint Prosecution and Sharing Agreement in 1994. Later, in 2003, both withdrew, and became stand-alone plaintiffs. (App. 154-205). They were even free from any duty to pay 3% to Plaintiffs' Committee as attorneys' fees, which all other class members must do.

> Corporations ... The claims of the six Native Corporations elected not to join the Joint Prosecution Agreement or sign on to the Allocation Plan ..." (U.S.D.C. Docket 6806 at 5).

Approving Class Counsel/Plaintiffs' Committee's plan, District Court defined that portion of EQSF damage "pie" as "off the top", not subject to reduced "matrix share" in Joint Prosecution and Sharing Agreement, just as Class Counsel/Plaintiffs' Committee asked District Court to do.[4]

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[4] 1/12/1996, Class Counsel/Plaintiffs' Committee acknowledged portion of aggregate punitive damages "pie" to be disbursed "off the top" to non-signatories.

> It is appropriate for the Court to give final approval to the Plan of Allocation notwithstanding that a few individual plaintiffs have, to date, withheld agreement. The Plan of Allocation provides that any amounts awarded to non-signatories will be taken 'off the top', and the percentage shares of the various Claim Categories for which the Plan of Allocation provides [e g., signatories] will be applied to the aggregate amount of recoveries remaining after the payment is made to those non-signatories. Memorandum In Support Of Joint Motion of Plaintiffs and Defendants For Preliminary Approval Of Phase IV Settlement, Etc. See, CIP's Appendix to Petition for Writ 2000 at 87 (emphasis added).

Class Counsel/Plaintiffs' Committee, in same motion, further noted: "The Plan of Allocation does not apply to the "Seattle Seven" [fish] processors who settled their Exxon claims early in the litigation and who will not share in any recoveries [collected by Plaintiffs' Committee] except their own settlement Id. at p. 86, n. 15.

8. *CIP and NME Released from Joint Prosecution and Sharing Agreement, Become Stand-Alone Plaintiffs After Restoration of Their Robins Dry Dock Compensatory Damages and Ninth Circuit's "Blessing" of Cede Backs for Settlement in Mandatory Classes.*

In 2000 and 2001, Ninth Circuit validated "cede back" settlements between Exxon and the Seattle Seven, as well as Sea Hawk, as a legitimate and useful means of individual class members settling with Exxon in mass tort actions. See, *Seattle Seven*, and *Four Processors*. Ninth Circuit described concept of "cede back" agreements as best method of reducing damage "pie" in mass tort class action, stating:

> The Seattle Seven, the largest of the region's seafood processors, sued Exxon in 1989. Exxon sought to reach a settlement as quickly as possible, but its negotiations with the Seattle Seven and other plaintiffs revealed a roadblock posed by the increasing likelihood that a mandatory punitive damages class would be certified. Claims for compensatory damages could be easily

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CIP and NME timely objected to Plans of Allocations and Distribution while they were still signatories to Joint Prosecution and Sharing Agreement. Later, when CIP and NME officially withdrew from Joint Prosecution and Sharing Agreement in 2003, they expressly preserved right to obtain same private settlement as Seattle Seven reached with Exxon, and to retain same "off the top" distribution of ceded punitive damage proceeds as Seattle Seven, which they then did, i.e., "after acquired" in 2006.

> disposed of by exchanging payment for releases, but a plaintiff's release of its slice of the future lump-sum punitive damages award merely reduced the number of claimants sharing the punitive damages pie, not the size of the pie itself. Exxon thus actually faced a financial disincentive to settle, because any amount of money it paid to persuade a plaintiff to forgo its slice would nevertheless be included in the amount of the eventual award.
>
> On January 8, 1991, the Seattle Seven and Exxon settled the Seattle Seven's claims for the 1989 and 1990 fishing seasons in exchange for a payment of $63.75 million. To avoid the punitive damages dilemma, the parties included in the agreement a "cede back" provision. The provision stated that the Seattle Seven would not release their punitive damages claims against Exxon but would instead remain parties to the litigation in order to receive their share of an eventual punitive damages award, which they would then cede back to Exxon.

Seattle Seven, at 793 (emphasis added.)

Also in 2001, Ninth Circuit restored CIP's and NME's ability to recover their *Robins Dry Dock* compensatory damages, including doing so based on Alaska law. *In Re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

Following these remands, CIP and NME "made peace" with Class Counsel/Plaintiffs'

Committee in 2003 settlement agreement to "each go their own way," and "eat what they kill" as set forth more fully in next section, upon following terms and conditions:

- CIP and NME were fully released from and free from Joint Prosecution and Sharing Agreement (even free from 3% attorney's fees all other class members were forced to pay);
- CIP and NME were entitled, as "stand alone plaintiffs," to fully pursue their reinstated Robins Dry Dock compensatory damages claims from Exxon, and were fully entitled to receive and retain all proceeds of same free from Class Counsel/Plaintiffs' Committee and other class members;
- CIP and NME agreed, solely, not to seek share of any proceeds of punitive damages verdict and judgment that were actually both "awarded to" and "collected by" Class Counsel/Plaintiffs' Committee;
- At time of such settlement, actual Cede Back Rights as to CIP and NME, via 1989/1990 releases and assignments, resided in Exxon and were thus not waived or released by CIP or NME in 2003 but were "after-acquired" in subsequent 2006 Settlement.

9. *2003 Agreement (CIP and NME Preserve "Other Rights ... to ... Punitive Damages"), to Wit: to Obtain Cede Back Rights to Collect "Off the Top".*

January 2003, Class Counsel/Plaintiffs' Committee and CIP and NME entered into agreement to release CIP and NME from Joint Prosecution and Sharing Agreement (including

Orders 351 and 352 as to "matrix" scheme regarding proceeds "collected by" Plaintiffs' Committee) and any obligation to:

- Contribute any funds from Robins Dry Dock claims to Joint Prosecution Joint Sharing Agreement of sums to be distributed under related plans of allocation and distribution;
- Pay Class Counsel/Plaintiffs' Committee any attorney's fees.

This allowed CIP and NME to pursue Exxon directly, as stand-alone plaintiffs regarding their Robins Dry Dock compensatory damages claims and certain economic coercion punitive damages claims as to Exxon's post-spill conduct, in exchange for CIP's and NME's promise to waive, solely, then existing rights to share in that portion of punitive damages both "awarded to and collected by" Class Counsel/Plaintiffs' Committee (e.g., subject to plans of allocation and distribution and "matrix shares") while "expressly" recognizing that CIP and NME "preserve and do not waive all their other rights, claims ... damages, rights to proceeds, recoveries .. as to either compensatory or punitive damages ..." (the "2003 Agreement") (App. 154-205) (emphasis added).

Specifically, 2003 Agreement provided Class Counsel/Plaintiffs' Committee agreed: "All proceeds [of CIP's and NME's stand-alone] activities, including the proceeds of settlement or trial of any and all such 'Robins Dry Dock' claims, and any related claims, or any other claims [CIP and NME] may have [existing presently] against Exxon which related to the Exxon Valdez grounding and oil spill ... retained exclusively [for CIP and NME] ... [and] all parties to the joint prosecution agreement, would

agree not to ... impact ... retain or convert, or assert authority to ... any said claims." (App. 175-176).

In exchange, CIP and NME:

> Agree that neither... have any right to participate in any distribution of or receive any share of any punitive damages [both] awarded to and collected by Plaintiffs" [and that CIP and NME] "[w]aive, relinquish, release and discharge any and all rights of any nature whatsoever which they contend they may have to participate in any distribution of or receive any share of any punitive damages [both] awarded to and collected by Plaintiffs [or to] participate in any distribution of or receive any share of any recoveries by [Plaintiffs' Committee's clients] pursuant to either the Amended Plan of Allocation approved by the [District] Court in Order No[s]. [317, 327, 351, 352].
>
> (App. 158-159) (emphasis added).

As consideration for CIP's and NME's release and waiver of rights, solely to collect, under any portion of punitive damages both "awarded to and collected by" Class Counsel/Plaintiffs' Committee under plan of allocation, etc., the 2003 Agreement preserved "other ... rights to proceeds", and confirmed it was:

> [E]xpressly understood and agreed that [CIP and NME] **preserve** and **do not waive** all their other rights, claims ... damages, rights to proceeds, recoveries .. as to either compensatory or punitive

damages ..." (App. 160) (emphasis added).

In sum, CIP and NME gave up approximately $181,000 which Class Counsel/Plaintiffs' Committee promised them as compensatory damages as signatories to Joint Prosecution and Sharing Agreement in exchange for right to "eat what they kill" as to ability to thus receive all fruits and proceeds of *Robins Dry Dock* claims, including to get Exxon to rescind the 1989/1990 releases, and reassign the Cede Back Rights to CIP and NME as to their 5% share of punitive damage pie, collected "off the top," and stand "in the shoes" of Exxon as non-signatory. The after-acquired, reassigned Cede Back Rights were thus not any of released rights, to share in that other portion of the "pie" "collected by" Plaintiffs' Committee.

10. *2006 Agreement (Exxon Rescinds/ Releases, Restores and Reassigns "Cede Back Rights" Previously Assigned to Exxon in 1989/1990 Agreements).*

In 2006, CIP and NME, after spending hundreds of thousands of dollars preparing for trial, conducting innumerable depositions and pretrial litigation in many states, and asserting $100 million in compensatory damages ($39,000,000 as to CIP and $23 million, excluding, as to both, prejudgment interest, costs, attorney's fee), settled with Exxon on the eve of jury trial.

Exxon agreed to fully revoke and rescind releases of punitive damages, and reassign rights previously assigned/ceded to Exxon in 1989/1990 Agreements (which had previously been used by Class Counsel/Plaintiffs' Committee to "squeeze out" and "bar" and "eject" CIP and NME from their

rightful share of liability fund created by mandatory punitive damages class) and restore and reassign to CIP and NME "cede back" or "assignment" rights, as well as partial payment of $8,500,000.00 to both CIP and NME with agreement to pay additional money due in light of ultimate resolution of ongoing prejudgment interest and attorneys fees issues ("2006 Agreement") (App. 206-209). Specifically, CIP and NME entered into 2006 Agreement with Exxon on following conditions:

- Rescinding of releases and reassignment as to the 1989/1990 releases, "cede back" Agreements as to punitive damages, to wit, CIP's and NME's restored and "after-acquired rights" to collect "off the top" of the EQSF (hereinafter "Cede Back Rights").
- $8.5 million payment from Exxon to CIP and NME due immediately;
- Additional sums due CIP and NME as to certain rulings regarding prejudgment interest and Rule 82 attorney's fees, which now approach $13 million.

11. *Class Counsel/Plaintiffs' Committee Moves, Once Again, to "Squeeze Out" and Exclude CIP and NME.*

EQSF Administrator has, to date, reserved in excess of $45 million for CIP and NME with respect to CIP's and NME's claim to their 5% "off the top" pro rata share of punitive damages settlement proceeds held by fund.

After the 2006 Settlement, and notice of same, on 4/18/2007 Class Counsel/Plaintiffs' Committee again sought to "squeeze out" CIP and NME and moved for court order that, among other things, CIP and NME were still excluded from any right to share

in punitive damages awarded to Mandatory Punitive Damages Class, contending the 2003 Agreement released any and all of CIP's and NME's rights to share in proceeds of Mandatory Punitive Damages Class judgment. (U.S.D.C. Docket 8505). They ignore "collected by" versus "awarded to" distinction, valid rescinding of releases, reassignments of the Cede Back Rights and "off the top" mechanism for collection and disbursement.

12. *Native Corporations, Seattle Seven and Exxon Take "Off the Top" Punitive Damages Proceeds Not "Collected By" Class Counsel/Plaintiffs' Committee.*

Throughout this litigation, District Court, Class Counsel/Plaintiffs' Committee and Exxon have expanded "off the top" status to non-signatories of Joint Prosecution Agreement, notwithstanding "matrix share" applicable to signatories of Joint Prosecution and Sharing Agreement. (App. 149-153).

a. Native Corporations Take "Off the Top".

Of $383,349,750 which EQSF received as payment from Exxon,[5] as punitive damages principal, $19,678,268 has been distributed "off the top" to certain Native Corporations who were non-

[5] Exxon did not deposit the entire $507.5 million into EQSF. They withheld approximately $40 million for their own costs and fees (which was subsequently rejected and they were directed to put the $40 million back). Notably, Exxon also withheld Seattle Seven's retention of percentage of its "ceded rights" pursuant to Seattle Seven and Exxon "cede back" agreement for which Exxon is now taking 11% "off the top" credit from EQSF

signatories to Joint Prosecution and Sharing Agreement, and were entitled to approximately 3%.

On 7/1/2009, EQSF received $470,268,908.71 in punitive damages interest from Exxon. Of the $470,268,908.71, $21,152,178.22 was distributed to Chugach group of Native Corporations because of their 3% "off the top" status. (U.S.D.C. Docket 8884)

b. District Court Approves Seattle Seven/Exxon Take "Off the Top," Ninth Circuit Blesses "Cede Back" Mechanism.

As to Seattle Seven, who were also non-signatories to Joint Prosecution and Sharing Agreement and related distribution plan, District Court initially refused to allow them any "off the top" recovery because they had ceded their rights to punitive damages to Exxon and not disclosed same to court or jury. However, Ninth Circuit subsequently ruled, see *Four Processors*, issue of "whether Exxon may enter into settlement agreement that permits it to recoup damages assessed against itself" was controlled by *Seattle Seven, 239 F.3d* at 988. District Court erred "in refusing to permit Exxon to share [via a "cede back" - "off the top"] in the punitive damages award." Id.

District Court ruled (via agreement with Plaintiffs' Committee) that 11% of any punitive damage recoveries must be allocated to Seattle Seven "off the top" and as non-signatories to Joint Prosecution and Sharing Agreement. (U.S.D.C. Docket 7441), see generally, App. 235-237. The modification also permitted Seattle Seven to retain portions of their punitive damage allocation rather than ceding it all back to Exxon. Id.

Of $383,349,750 which the EQSF received as payment from Exxon, $1,674,750.00 of total was set aside, "off the top" for Seattle Seven pursuant to repurchase from Exxon of portions of their "cede back" rights. (U.S.D.C. Docket 8884).

c Class Counsel/Plaintiffs' Committee Approves and Acknowledges Exxon's Right to Credit for Cede Back Rights "Off the Top" Irrespective of the Matrix Scheme, and CIP and NME Demand Equal Treatment.

While time was running for filing of this Petition, after Plaintiffs' Committee had told Ninth Circuit in instant case CIP and NME shall not have their reassigned "cede back" rights and claims honored, Exxon continued to assert its own "cede back" rights at District Court level, as it was "end of the day," to see who had standing to "collect" proceeds from $500 million in punitive damages and $500 million in post-judgment interest.

On 8/31/2009, Exxon moved District Court for order directing EQSF Administrator to make payment to Exxon in the amount of $4,408,499.76 pursuant to additional assignment agreements Exxon entered into with Sea Hawk, irrespective of Orders 351 and 352 and the Plan of Allocation and Distribution and the matrix, and even if the "cede back" processor assignors were "over paid." (U.S.D.C. Docket 9287). Class Counsel/Plaintiffs' Committee agreed to recommend reserves for Exxon to collect on these "off the top" claims irrespective of the Joint Prosecution and Sharing Agreement and related orders and plans of allocation and distribution. (U.S.D.C. Docket 9319). Specifically,

Class Counsel/Plaintiffs' Committee advised the District Court to order that:

> The [EQSF] Administrator is hereby authorized and directed to reserve $5,681,056.39 of the litigation proceeds held in the [EQSF] to cover Exxon's claims made in its August 31, 2009 Motion. Such reserve shall be set aside from the litigation proceeds as a whole and not from the fund held for benefit of any particular Claim Category. [i.e., "off the top"] The availability of the reserve to satisfy Exxon's claims shall not be affected or lessened in any way if the Processor Claim Category, or any other Claim Category, or any individual claimant shall turn out to be overpaid.

(U.S.D.C. Docket 9319-2 at 2) (emphasis added.)

12/9/2009, in anticipation of District Court's entry of judgment against Exxon assessing punitive damages in principal amount of $507.5 million, with post-judgment simple interest computed at 5.9% per annum from 9/24/1996 until paid, Class Counsel/Plaintiffs' Committee acknowledged Exxon's right to take 11% credit based on Seattle Seven "cede back" agreement, notwithstanding plans of allocation and distribution and Orders 351 and 352, which orders were subsequently modified in differing fashions post-2003, approving of:

- Exxon's election to take 11% credit [as to Seattle Seven] and 3% credit [as to Native Corporations] against it obligation to pay any money judgment into the consolidated case fund [e.g.,

those funds "collected by Class Counsel/Plaintiffs' Committee and those other funds set aside for "off the top" disbursement] held in the EQSF, as well as;

- Exxon's full satisfaction of judgment by paying $383,349,750 into fund on 8/27/2008, then $470,268,908.71 into the fund on 7/1/2009 and final payment of $71,844,955.51 in final satisfaction of judgment on 12/9/2009. (App. 235-237).

Quite simply, it was "end of the day" and owners/holders of "commercial paper", i.e., "cede back rights," "check," "IOU", "lien" were demanding to be paid and in fact entitled to be paid as evidenced by reserve for the additional Exxon "cede back" claims agreed to by Mr. Sarko (EQSF Administrator) and Class Counsel/Plaintiffs' Committee and blessed by Court. Accordingly, CIP and NME did likewise.

On 11/3/2009, CIP filed its Notice and Demand and Presentment for Payment of settlement proceeds of the EVOS punitive damage verdict and judgment, with anticipated joinder by NME. (U.S.D.C. Docket 9401).

On 11/27/2009, CIP moved the District Court for an Order for Payment, (App. 210-234), with similar anticipated joinder.

C. Proceedings Below

1. *District Court's Order 371 as to 2003 and 2006 Agreements.*

In Order 371, District Court ruled on Plaintiffs' Committee's Motion to Squeeze Out and Exclude CIP and NME. District Court acknowledged while 2006 Agreement lawfully rescinded 1989/1990 releases and reassigned the

Cede Back Rights and reinstated CIP's and NME's punitive damages claims against Exxon (App. 41), and "even though Cook Inlet and Nautilus meet the definition of a class member" (App. 53), 2003 Settlement Agreement nullified all their rights to punitive damages, ruling that by virtue of 2003 Agreement "they gave up [all] their rights to share in the punitive damages class award (sic.)." (App. 51). This does not account for "collected by" language and concept of after-acquired rights.

District Court made no mention of language in 2003 Agreement expressly "preserving" CIP's and NME's "other rights ...to proceeds, ... as to either compensatory or punitive damages ..." which were not *collected by* Class Counsel/Plaintiffs' Committee – namely those Cede Back Rights, then held in 2003 by Exxon to which CIP and NME had no rights until 2006, by virtue of 1989/1990 Agreement to "off the top" portion of punitive damages which, by definition, are not "collected by" Class Counsel/Plaintiffs' Committee (App. 158, 160). (emphasis added). Those Cede Back Rights were "after-acquired" by CIP and NME post-2003 in 2006 settlement with Exxon and now reside in CIP and NME and must be honored.

In short, in Order 371, the District Court refused to allow stand-alone plaintiffs' rights to enjoy fruits of their 2006 Settlement Proceeds Cede Back Rights purchased from Exxon, just as District Court initially erroneously ruled as to the Seattle Seven (subsequently reversed by the Ninth Circuit). See *Seattle Seven, 229 F.3d 790,* and *Four Processors, 239 F.3d 985* as to fellow fish processors.

2. *Ninth Circuit Affirms District Court's Order 371*

Ninth Circuit misinterpreted CIP's and NME's appeal of Order 371 and position by stating they:

> [N]ow contend that the 2003 agreement should not be given effect (sic.) because their 2006 settlement with Exxon, to which the plaintiffs' class was not a party" because "Exxon 'reassigned and restored' Polar Equipment's and Nautilus Marine's rights to share in the class recovery of punitive damages.
> (App. 3).

Ninth Circuit erroneously ruled District Court correctly held, in light of 2003 Agreement, by which CIP and NME "agreed to be 'bound by the terms and conditions of Order No. 351 and Order No. 352 for all purposes,' and they agreed to '[w]aive, relinquish and discharge any right of any nature whatsoever which either of them may have to participate in any distribution of or receive any share of any recoveries by Plaintiffs pursuant to either the Amended Plan of Allocation approved ... [in] Order No. 351, or the Amended Plan of Distribution of Allocations to the Processor Claim Category approved by the Court in Order No. 352 [i.e., the proceeds "collected by" the Plaintiffs' Committee]'" (App. 4), CIP and NME could not share in <u>any</u> punitive damages proceeds of 1994 verdict and judgment.

Like District Court below, Ninth Circuit's opinion did not discuss language in 2003 Agreement by which CIP and NME preserved their right to punitive damages that were <u>not</u> both "awarded to and collected by" Class Counsel/Plaintiffs'

Committee subject to allocation amongst signatories to the Joint Prosecution Agreement as opposed to "*other rights*, claims ... damages, rights to proceeds, recoveries ... as to either compensatory or *punitive damages* ..." which were not "collected by" Class Counsel/Plaintiffs' Committee." (App. 158, 160) (emphasis added).

On 8/14/2009 CIP and NME moved for Rehearing and Rehearing En Banc. Rehearing was denied. (App. 73-75).

REASONS TO GRANT THE PETITION

A. Summary of Argument

Few issues are more important. At stake are Rights to Due Process, Equal Protection and Jury Trial of two fish processing businesses, and stand-alone members of federal mandatory punitive damages class, who have fought for 20 years to obtain full compensation for devastating economic losses they suffered due to catastrophic EVOS. It is now "the end of the day," for this 20 years of litigation.

CIP and NME "stand in the shoes of Exxon", as to Cede Back Rights and are "holders in due course" for value as to same, and District Court, Class Counsel/Plaintiffs' Committee and Administrator of the EQSF have an obligation to honor and enforce said rights, given CIP's and NME's standing as vested members of mandatory Class, holders in due course for value, presenting such rights for payment given Notice, Demand, and Presentment, and as promisees/beneficiaries of 2003 and 2006 Settlements.

District Court, Class Counsel/Plaintiffs' Committee and EQSF Administrator by "squeezing out" CIP and NME, have breached their fiduciary duties to honor CIP's and NME's rights and arrange for reserved settlement proceeds "off the top" of the total fund, just as they have done for Seattle Seven, Native Corporations and Four Processors.

B. The Decisions Below Are Wrong As a Matter Of Law.

1. *District Court and Ninth Circuit Ignored Distinction Between Punitive Damages Proceeds "Awarded To" Class, Versus Those "Collected By" Class Counsel/Plaintiffs' Committee vs. Those "Collected By" Other Parties for Disbursement "Off the Top."*

CIP and NME, like Seattle Seven, are not seeking distribution of funds "collected by" Class Counsel/Plaintiffs' Committee for distribution under plans of allocation and distribution and matrix system for signatories of the joint prosecution agreement, but "off the top" and thus not "collected by" Plaintiffs' Committee. In 2003, both parties were well aware of 2000 and 2001 decisions in *Seattle Seven* and *Four Processors* declaring the assignment and cede back mechanism "lawful" and "enforceable". Accordingly, CIP and NME made sure to preserve for themselves, in the 2003 Agreement, opportunity to seek from Exxon, after execution of 2003 Agreement, as settlement proceeds of their "*Robins Dry Dock*" claims, restoration and cede back of punitive damages rights then held by Exxon, which they did in 2006.

Ninth Circuit's opinion mischaracterizes CIP's and NME's position, as 2003 Agreement waived only

presently existing rights, to portion of EQSF both "awarded to and collected by" Class Counsel/Plaintiffs' Committee, explicitly preserving CIP's and NME's right to regain rights, then held by Exxon, to Cede Back Rights taken "off the top" of the EQSF for non-signatories, just like Ninth Circuit approved for Seattle Seven in 2000. (App. 158, 160). Instead, Ninth Circuit described CIP's and NME's position:

> Appellants now contend that the 2003 Agreement should not be given effect [sic] because their 2006 settlement with Exxon, to which the plaintiffs' class was not a party, said that Exxon 'reassigned and restored' [CIP's and NME's] rights to share in the class recovery of punitive damages. (App. 3).

Neither CIP nor NME contended 2003 Agreement should not be given effect. It is precisely 2003 Agreement which allows them to keep all after-acquired Cede Back Rights they purchased from Exxon in 2006 as to punitive damage proceeds "off the top", as non-signatories to Joint Prosecution and Sharing Agreement, which are not those punitive damage proceeds "collected by" Class Counsel/Plaintiffs' Committee.

Nowhere in 2003 Agreement do CIP or NME waive their right, explicitly preserved therein to seek and retain "*other rights*, claims ... damages, rights to proceeds, recoveries ... as to either compensatory or *punitive damages* ... (namely, those "off the top" rights to punitive damages which CIP and NME ceded to Exxon in 1989/1990). (App. 154-205). Ninth Circuit's opinion ignores, as did District Court, CIP's and NME's basic property rights in 2003 Agreement

to retain all proceeds of their after-acquired rights to "*other* ... proceeds, recoveries .. as to either compensatory or *punitive damages* ..." such as the "off the top" right to punitive damages which CIP and NME ceded to Exxon in 1989/1990 and re-purchased, for good and valuable consideration, in the 2006 Agreement). (App. 160).

Interpreting and construing 2003 Agreement, Ninth Circuit should have examined all extrinsic evidence and all circumstances surrounding contract. *Estate of Polushkin ex rel. Polushkin v. Maw*, 170 P.3d 162, 166-67 (Alaska, 2007) (Alaska law requires courts interpreting contract consider all relevant extrinsic evidence). Had CIP or NME intended to waive (or Class Counsel/Plaintiffs' Committee intended for them to waive) all rights to punitive damages proceeds as result of EVOS, parties would have provided they release all "after-acquired" rights (not simply rights they "may have" i.e. presently) to proceeds from EQSF as member of mandatory punitive damages class.

If the courts below were correct in holding that CIP and NME intended to waive all rights to collect punitive damage proceeds, from which ever slice of the pie, (i.e., even those not "collected" by Class Counsel/Plaintiffs' Committee), the following provisions in 2003 Agreement are superfluous: (1) CIP and NME releasing rights both "awarded to" and "*collected by*" plaintiffs; (2) express preservation of "*other rights*, claims ... damages, rights to proceeds, recoveries ... as to either compensatory or *punitive damages* ...". (App. 154-205). (emphasis added).

2. *District Court Ignored CIP's and NME's Express Preservation of Right to Obtain Right to Collect "Off the Top" Just Like the Seattle Seven As Approved by the Ninth Circuit.*

District Court in Order 371, properly recognized 2006 Agreement lawfully rescinded CIP's and NME's 1989 and 1990 releases and reconveyed assignments of their punitive damage rights to Exxon, such that Cede Back Rights are effective, but then improperly denied them to CIP and NME. (App. 5-54)

2003 Agreement was culmination of relationship gone sour. Under Plaintiffs' Committee's "matrix" then existing, CIP and NME would not collect punitive damages proceeds. Accordingly, Plaintiffs' Committee agreed to allow them to go their own way, and each party to 2003 Agreement would "eat what it killed." Class Counsel/Plaintiffs' Committee would retain monies it "collected" for distribution under Joint Prosecution and Sharing Agreement. CIP and NME would seek their own share of proceeds to be collected "off the top" such that Class Counsel/Plaintiffs' Committee had no right to collect proceeds for parties it does not represent. Portion of punitive damages judgment attributable to CIP and NME's claims (i.e., their 5% pro rata share), is to be collected "off the top," not by Plaintiffs' Committee.

Ninth Circuit's and District Court's rulings ignore or misconstrue 2003 Agreement as it only applied to then existing rights to specific portion of settlement funds "collected by" Class Counsel/Plaintiffs' Committee, preserving right to seek and retain punitive damage proceeds not

"collected by" Class Counsel/Plaintiffs' Committee (e.g., collected "off the top") in form of Cede Back Rights, to which CIP and NME then had no claim, because such Cede Back Rights, assigned to Exxon in 1989/1990 Agreements, were held by Exxon in 2003, from 1989 to 2006, as holders in due course, for 5% "off the top" share of punitive damage proceeds, just like Seattle Seven.

C. Federal Maritime and Alaska Law Violated.

Should this Court permit Ninth Circuit opinion to stand, Class Counsel/Plaintiffs' Committee will divert CIP/NME punitive damages proceeds to entire class (not just proceeds "collected by" Plaintiffs' Committee) i.e., proceeds directly attributable to CIP's and NME's compensatory damages, allowing signatories to Joint Prosecution and Sharing Agreement (many of whom are directly represented by Class Counsel/Plaintiffs' Committee) to receive windfall far beyond 1:1 ratio contemplated by Court in *Baker*, thus, in violation of federal maritime common law.

Upon remand from this Court following *Baker*, Ninth Circuit was required to remit punitive damages award based on aggregate compensatory damages sustained and collected by all plaintiffs (which includes millions of compensatory damages Class Counsel/Plaintiffs' Committee used to obtain their class settlement with Exxon as to compensatory damages for fish processors). The compensation Exxon paid into EQSF pursuant thereto was not both "awarded to and collected by" Class Counsel/Plaintiffs' Committee, but rather awarded to entire class, of which CIP and NME are vested members entitled to a 5% "off the top" share

"in the shoes" of Exxon as purchasers of Cede Back Rights.

In *Baker*, this Court held a 1:1 ratio is fair upper limit in federal maritime cases. Court held "[a] punitive-to-compensatory ratio of 1:1 ... yields maximum punitive damages in that amount" and remanded case for Court of Appeals to remit punitive damages award accordingly. Id.

Court's justification for adopting a 1:1 ratio was to provide predictability and fairness as to punitive damages awards in maritime cases. This reasoning applies not just to defendants, but to class members in a maritime action as well. Id.; *The Amiable Nancy*, 16 U. S. 546 (1818). The 1989/1990 agreements were the product of economic coercion, and CIP and NME sued Exxon for same, and then settled in 2006 for both EVOS compensatory damages and such economic coercion/punitive damages for 1:1 reconveyence of the Cede Back Rights. Stand-alone plaintiff such as CIP and NME, as well as defendant Exxon, must have the right to bargain for such compensation with a defendant and have such contract enforced by courts. See *Seattle Seven*, 229 F.3d 790; *Four Processors*, 239 F.3d 985; AS §§ 46.03.822 and 824.

D. Constitutional and Federal Statutory Rights Violated.

Discriminatory treatment of CIP and NME by Class Counsel/Plaintiffs' Committee, to deprive them of their substantial portions of the compensatory and punitive damage proceeds, to which they are entitled and promised under this Court decision in *Baker*, 128 S.Ct at 2605 and in the form of a "cede back" mechanism "blessed" by the Ninth Circuit as to fellow fish processors the Seattle Seven and Sea

Hawk in *Seattle Seven*, 229 F.3d 790 and *Four Processors*, 239 F.3d 985, is unconstitutional, unfair, illegal, inequitable, and egregious misuse of Rule 23 of Federal Rules of Civil Procedure.

CIP and NME originally filed suit in state court; removed and required to join certified class in federal court. As such, they are full members of mandatory punitive damages class, and pursuant to a class action certified under FRCP 23(b)(1)(B), they hold due process and equal protection rights. Id.; *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S.Ct. 115, 85 L.Ed. 22 (1940). (General principle is "there has been a failure of due process . . . where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."); *Gendron v. Shastina Properties, Inc.*, 578 F.2d 1313 (9th Cir. 1978) (Though a class action settlement committee has been set up by compromise agreement approved by the District Court, equity demands that there be proper limits to such discretion); *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991) (courts must insist on conscientious representative plaintiff; all class suits create some conflict between representative and class, and representative and counsel may be tempted to sell out class for their own benefit).

Here, District Court, Class Counsel/Plaintiffs' Committee and EQSF have obligation to ensure allocation of proceeds of Mandatory Punitive Damages Class, whether "off the top" or pursuant to a plan of distribution applicable to signatories to a Joint Prosecution and Sharing Agreement, is "fundamentally fair, adequate and reasonable" to all parties involved. *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982)

(emphasis added), cert. denied 459 U.S. 1217 (1983); 26 U.S.C. § 468B. Class Counsel/Plaintiffs' Committee cannot favor their own clients (for recovery of their own contingency fees) at expense of other class members.

Obviously, CIP and NME were a "thorn in the side" of the District Court, Class Counsel/Plaintiffs' Committee and the Ninth Circuit throughout the litigation. Given their unpopular status, Plaintiffs' Committee, District Court and Ninth Circuit ignored or failed to honor CIP's and NME's rights to collect under the 2003 and 2006 Agreements, as holders in due course of the commercial paper as to the Cede Back Rights, as "blessed" by the Ninth Circuit. Courts' error has violated CIP's and NME's rights by ignoring clear distinction between proceeds "awarded to" litigant or class, and proceeds "collected by" litigant or class, and ignored doctrine of after-acquired rights as it relates to settlements, and is a windfall for other class members, who receive more than 1:1.

This violates Due Process, Equal Protection and Right to Jury Trial, by causing "a small minority of the class members ... to bear an unduly disproportionate share of the accompanying burdens" of a class action. *Officers for Justice*, 688 F.2d at 624.

E. Fiduciary Duties To Class Members Violated.

Ninth Circuit's affirmation of District Court's exclusion of CIP and NME from right to collect proceeds of Cede Back Rights purchased, for good and valuable consideration, from Exxon, and Class Counsel/Plaintiffs' Committee's discrimination against them in favor of signatories to Joint

Prosecution and Sharing Agreement (many of whom are clients of members of Plaintiffs' Committee) is violation of fiduciary duties owed by District Court to CIP and NME. Id.; see *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003).

"Under Rule 23(e), the District Court acts as a fiduciary who must serve as guardian of the rights of absent class members." *Grunin v. Int'l House of Pancakes*, 513 F.3d 114, 123 (8th Cir. 1975). It is appropriate for District Court to serve this role as guardian for absent class members because District Court is heavily involved in management of class actions and, therefore, "'is exposed to the litigants, and the strategies, positions and proofs.'" Id. (quoting *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3rd Cir. 1971)).

Pursuant to 26 U.S.C. § 468B(3)(C), EQSF itself (and not Plaintiffs' Committee), must be "treated as the owner of the property in the fund (and any earnings thereon"). As a corporation, the EQSF had and has duty to CIP and NME, to recognize their status as holders of Cede Back Rights (declared by the Ninth Circuit as lawful means of acquiring settlement proceeds) and right to take "off the top" of the EQSF, like Seattle Seven, and to honor the "end of the day" request for payment.

Discrimination by Class Counsel/Plaintiffs' Committee, in violation of fiduciary duty to CIP and NME as class members, is similar to discrimination by which Class Counsel/Plaintiffs' Committee caused "no action" to be taken against their fisherman clients who had signed similar releases/"cede back" agreements to those of CIP and NME, but Class Counsel/Plaintiffs' Committee utilized in first instance to effectively eject CIP and NME from plans

of allocation and distribution of punitive damage proceeds collected by them while maintaining their own fishermen clients' status.

Class Counsel/Plaintiffs' Committee's decision to settle class' compensatory damages for "token" net of $19 million, then approve class' total compensatory damages at $2.2 billion, excluding CIP and NME from any share of Mandatory Punitive Damages Class as signatory of Joint Prosecution and Sharing Agreement and then, after allowing CIP and NME to withdraw from unfair Joint Prosecution and Sharing Agreement, interpret 2003 Agreement as nullifying CIP's and NME's rights to collect "off the top" as non-signatories, such that other class members will receive more than their 1:1 share of punitive damages is unfair, unjust and a violation of Class Counsel/Plaintiffs' Committee's fiduciary duties to CIP and NME.

CONCLUSION

Petition should be granted to correct egregious departure from accepted and usual course of judicial proceedings.

This matter involves important rights of vested class members, in a federal maritime action, to equal nondiscriminatory treatment and constitutional Due Process, Equal Protection, and Jury Trial Rights via 5th, 7th, and 14th Amendments, granted to *any plaintiff* in a civil action, to receive and retain the for value proceeds of their causes of action as holders in due course of "commercial paper" (i.e. "cede back" settlement rights to fruits of "commercial paper" that they have purchased) from Exxon, a settlement mechanism approved of and

encouraged by Ninth Circuit in these mass class actions.

For the reasons stated, this Petition should be granted.

RESPECTFULLY SUBMITTED this 22nd day of December, 2009.

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